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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 TAMMIE C. RICHARD,

11 Plaintiff,

12 v.

13 CECIL KELSEY a single man; ALASKA
14 VEHICLE TRANSPORT, a division of
15 UNITED ROAD SERVICES, INC., a
Delaware corporation.,

16 Defendants.
17

Case No. C09-5253 FDB

ORDER DENYING MOTION
FOR RECONSIDERATION

18 This matter comes before the Court on Plaintiff's motion for reconsideration of Defendants'
19 motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to commence suit within the
20 applicable statute of limitations. The Court, having reviewed the motion and response, is fully
21 informed and denies the motion for reconsideration. Thus, the Defendants are entitled to dismissal
22 of Plaintiff's claims with prejudice.

23 **Introduction and Background**

24 In this diversity action, this Court granted Defendants' motion to dismiss, finding Plaintiff
25 had failed to commence her cause of action within the three year statute of limitations and the claim

1 for negligence is subject to dismissal. The Court reasoned that Defendants were served outside the
2 90-day period for service, RCW 4.16.170, and as a result the action was not commenced within the
3 three-year statute of limitations, RCW 4.16.080.

4 Plaintiff requests reconsideration, asserting multiple bases: (1) service was accomplished
5 prior to the 120 days provided by Fed. R. Civ. P. 4(m), (2) service was perfected by mail on the out-
6 of-state defendants, and (3) Defendants waived the defense of insufficiency of service.

7 **Motion for Reconsideration**

8 Motions for reconsideration are disfavored. The Court will ordinarily deny such motions in
9 the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal
10 authority which could not have been brought to its attention earlier with reasonable diligence.”
11 Local Rule 7(h). Motions for reconsideration are not the place for parties to make new arguments
12 or to ask the Court to rethink what it has already thought. See N. W. Acceptance Corp. v.
13 Lynnwood Equip., Inc., 841 F.2d 918, 925-26 (9th Cir. 1988); United States v. Rezzonico, 32 F.
14 Supp.2d 1112, 1116 (D. Ariz. 1998). Motions to reconsider are directed to the sound discretion of
15 the court. Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 384, 390 (D.C. Puerto Rico 1981).

16 In arguing for reconsideration, Plaintiff presents new argument that should and could have
17 been presented in response to the motion to dismiss. Other than to note the facts do not support
18 Plaintiff’s argument, the Court will not address the assertions concerning service on out-of-state or
19 concealed defendants, or the assertion that Defendants waived the defense of insufficient service.

20 The Court will address the contention that the action was timely because service was
21 perfected within 120 days of filing the complaint pursuant to Fed. R. Civ. P. 4(m).

22 In diversity actions, federal courts generally apply state statutes related to the
23 commencement and tolling of statutes of limitations. See Walker v. Armco Steel Corp., 446 U.S.
24 740, 745-46 (1980); Lindley v. General Elec. Co., 780 F.2d 797, 799-801 (9th Cir. 1986). In
25 Washington, the conditions necessary to commence an action, and thus toll the running of the statute

1 of limitations, are governed by RCW 4.16.170. Under the terms of RCW 4.16.170, the filing of a
2 complaint does not constitute the commencement of an action for the purposes of tolling the statute
3 of limitations; it is still necessary for the plaintiff to serve a defendant within ninety days of the date
4 of filing in order for the commencement to be complete. O'Neill v. Farmers Ins. Co. of Washington,
5 124 Wn. App. 516, 523, 125 P.3d 134 (2004); Wothers v. Farmers Ins. Co. of Washington, 101 Wn.
6 App. 75, 79, 5 P.3d 719 (2000).

7 Here, the Defendants were served outside the 90-day period for service as provided in RCW
8 4.16.170, but within the 120 days set forth in Fed. R. Civ. P. 4(m). As previously determined,
9 application of the 90-day rule of RCW 4.16.170 would bar the action as not being commenced
10 within the three-year statute of limitations. However, as argued by Plaintiff, if Rule 4(m) governs
11 commencement of the action for the purpose of tolling the statute of limitations, the action would be
12 timely.

13 The state statute controls. Absent a direct conflict between a federal rule and state law, state
14 law applies in diversity actions. Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980). The Ninth
15 Circuit has held that there is no conflict between Rule 4(m) and a state statute of limitations virtually
16 identical to the one at issue here. In Torre v. Brickey, 278 F.3d 917 (9th Cir. 2002) the court
17 addressed the Oregon Revised Statutes § 12.020, which provides that an action is not commenced
18 until both filing of the complaint and service of summons on the defendant are accomplished except
19 that an action is deemed to have been commenced on the date the complaint is filed if summons is
20 served on the defendant within 60 days of filing the complaint. Id., at 919. On the other hand, Fed.
21 R. Civ. P. 4(m) provides a 120-day period from the filing of the complaint within which to serve
22 summons and complaint upon the defendant. Id. Plaintiffs asserted that there is a conflict between
23 the state and federal service requirements, and that the federal rule should control. Because the
24 complaint was filed within two years of the event, as required by the Oregon statute of limitations,
25 and the summons was served within 120 days thereafter, as required by Rule 4(m), Plaintiffs

1 contended the action was timely. The Court disagreed:

2 There is no conflict between Rule 4(m) and Oregon law because Rule 4(m) merely
3 sets a procedural maximum time frame for serving a complaint, whereas [Or. Rev.
4 Stat. § 12.020] is a statement of a substantive decision by that State that actual service
5 on, and accordingly actual notice to, the defendant is an integral part of the several
6 policies served by the statute of limitations. [A] plaintiff in federal court thus has 120
7 days to effect service after filing a complaint only if this period enables him to serve
8 within the statutory period for commencing an action controlled by state law. Thus,
because there is no conflict between the federal rule and state law, state law should
apply. Under Oregon law, the action was not commenced until February 15, 2000, the
date defendant was served with summons, and a date more than two years after
October 20, 1997, the date the alleged battery was committed. The district court
therefore correctly applied Oregon law and properly dismissed the action as
time-barred.

9 Torre, at 919-20 (citations omitted). See also, Habermehl v. Potter, 153 F.3d 1137, 1139 (10th Cir.
10 1998); Larsen v. Mayo Medical Center, 218 F.3d 863 (8th Cir. 2000); Lyons v. H & R Transport,
11 Inc., 231 F. Supp2d 1009 (D. Or. 2001).

12 For these reasons, and the reasons set forth in this Court's Order Granting Motion to Dismiss
13 [Dkt. # 22], Plaintiff failed to commence her cause of action within the three year statute of
14 limitations and the claim for negligence is subject to dismissal.

15 Conclusion


16 For the above reasons, Plaintiff's motion for reconsideration is denied.

17 ACCORDINGLY;

18 IT IS ORDERED:

19 Plaintiff's Motion for Reconsideration of Order Granting Defendants' Motion to Dismiss and
20 Final Judgment [Dkt. # 24] is **DENIED**.

21 DATED this 9th day of November, 2009.

22
23 
24 FRANKLIN D. BURGESS
25 UNITED STATES DISTRICT JUDGE